United States Court of Appeals

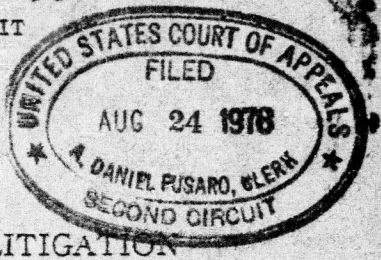
for the Second Circuit

BRIEF FOR APPELLEE

76-7356

United States Court of Appeals

FOR THE SECOND CIRCUIT



No. 76-7356

IN RE
MASTER KEY ANTITRUST LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE DEFENDANT-APPELLEE EMHART CORPORATION

To be argued by:

RALPH C. DIXON, ESQ.

On the brief:

RICHARD M. REYNOLDS, ESQ.
HOWARD P. JAMES, ESQ.
DAY, BERRY & HOWARD
One Constitution Plaza
Hartford, Connecticut 06103

Attorneys for Defendant-Appellee:

EMHART CORPORATION

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STATEMENT OF THE ISSUES

I. Is the settlement of complex and protracted multi-district antitrust litigation to be frustrated by a sole objector out of 40,000 class members, which does not object to the amount of the settlement fund but only to the allocation of the fund between the public and private classes, where the allocation is based on business records prepared long before litigation was instituted, where the allocation is supported by all other counsel and class members and has been approved as fair and reasonable by the District Judge, and where the sole objector, despite ample opportunity to do so, has not come forward with concrete and relevant data to support any other allocation?

II. Did the District Court abuse its discretion in finding, on the basis of the voluminous record and supporting

evidence before it, that the proposed settlement between plaintiffs and defendant Emhart Corporation is both fair and reasonable?

STATEMENT OF THE CASE

This is an appeal from the approval of the settlement by Emhart Corporation ("Emhart") of multidistrict private antitrust class actions after six years of litigation. Appellant Exxon Corporation ("Exxon"),* the sole objector out of more than 40,000 class members, does not contest the adequacy of the amount of the settlement.** Rather, Exxon's objection is limited to the allocation of the settlement fund between the public entities and private entities classes. On the basis of such objection, it seeks to overturn the settlement.

STATEMENT OF FACTS

I. THE BACKGROUND OF THE LITIGATION

A. The Products Involved

The litigation from which this appeal arises involves alleged antitrust violations in the sale and distribution of contract hardware manufactured by the defendants, Ilco Corporation ("Ilco"), Sargent & Company ("Sargent"), Eaton Yale & Towne, Inc. ("Eaton") and Emhart, particularly those items of contract hardware which comprise master key systems.

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*Eight of Exxon's affiliated companies are also nominal parties to this appeal.

**In the consolidated appeal of the approval of the settlement by Ilco Corporation, objection is made to the adequacy of the settlement fund established by Ilco. Exxon is likewise the sole objector to that settlement. Because Emhart is, of course, not a party to the Ilco settlement, that agreement will not be treated in this brief.

B. The Government Suits

In 1969, after approximately three years of investigation, the Antitrust Division of the United States Department of Justice filed four separate civil lawsuits against Emhart, Eaton, Sargent and Ilco (the "government suits").* The government suits alleged that each defendant had entered into illegal arrangements with its distributors regarding the sale and distribution of contract hardware, especially master key systems.** The complaints alleged that defendants restricted their distributors geographically, from bidding on specifications prepared by another distributor and from bidding on extensions to existing master key systems established by another distributor. The government suits challenged only alleged vertical distribution practices; they contained no allegations as to horizontal involvement among the defendant manufacturers.

C. The Private Suits

Beginning in 1970 various private suits for damages were filed.*** The complaints contain the same allegations as the government suits, and in addition the private plain-

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*_United States_ v. _Ilco Corp._, Civil Action No. 13261 (D. Conn., filed July 11, 1969); _United States_ v. _Emhart Corp._, Civil Action No. 13262 (D. Conn., filed July 11, 1969); _United States_ v. _Sargent & Co._, Civil Action No. 13263 (D. Conn., filed July 11, 1969); _United States_ v. _Eaton Yale & Towne, Inc._, Civil Action No. 13264 (D. Conn., filed July 11, 1969). The government requested only injunctive relief and elected not to file any damage actions. The government litigation against Emhart was terminated by Consent Decree on February 23, 1970. _United States_ v. _Emhart Corp._, 1970 Trade Cas. ¶ 73,048 (D. Conn. 1970).

**The government suits followed the establishment of new law by the Supreme Court as to vertical practices in the distribution of goods. _United States_ v. _Arnold, Schwinn & Co._, 388 U. S. 365 (1967).

***Those cases not filed in the District of Connecticut were transferred there either under 28 U. S. C. § 1404(a) or 28 U. S. C. § 1407.

tiffs allege that the defendant manufacturers conspired horizontally to fix list prices and to enforce similar vertical restraints. All defendants have denied the allegations.*

On May 27, 1975, the District Court for the District of Connecticut certified the various classes, transferred all but two of the pending cases to the District of Connecticut pursuant to 28 U. S. C. § 1404(a), consolidated all of those cases pursuant to Rule 42(a), *Fed. R. Civ. P.*, and ordered that separate trials be had on the issues of liability and damages. The classes, as certified, consist of several state-wide governmental classes, a national governmental entities class, and a national private builder-owner class consisting of builder-owners of hotels, motels, office buildings and apartment buildings. (AI 325-336; 399-400)** All defendants except Emhart appealed the District Court's May 27, 1975 order to this Court, which dismissed such appeal for lack of jurisdiction. *In re Master Key Antitrust Litigation,* 528 F. 2d 5 (2d Cir. 1975).

II. THE MASSIVE DISCOVERY AND EXTENSIVE PROCEEDINGS BELOW

The nationwide discovery in this litigation, which has extended over five years, has simply been awesome and is quite possibly without parallel in the history of the District of Connecticut. Its dimension may be grasped by a much abbreviated overview. Plaintiffs have examined literally millions of documents from defendants' files, have inspected documents at the three industry trade associations

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*The claims of the parties are set forth, in part, in this Court's opinion in *In re Master Key Antitrust Litigation,* 528 F. 2d 5 (2d Cir. 1975).

**The joint Appendix filed by appellant Exxon consists of two volumes, entitled Appendix I and II, respectively. References to the record will state the volume number followed by the page number. For example, page 20 of Appendix I will be referred to as AI 20.

in San Francisco, New York and Washington, and have reviewed records of contract hardware distributors throughout the United States. They have taken over 30 depositions and filed three sets of comprehensive interrogatories, as well as document and Rule 36 requests. Defendants, in addition to overseeing plaintiffs' discovery efforts and conducting their own depositions, have undertaken exhaustive document searches and reviews and filed several sets of interrogatories and document and Rule 36 requests. Both sides have retained economic experts, interviewed scores of potential witnesses, and analyzed the over 50,000 documents specifically identified to the litigation. At the present time there are over six hundred entries on the Docket Sheet of the District Court. With few exceptions, we think it fair to say that both sides are almost as well apprised of their opponents' case as they are of their own.

The magnitude of this litigation*, the extent of the discovery, the multiplicity of legal issues and various disagreements among counsel all had the potential to delay the progress of these cases. Rather than permit this to happen, Judge Blumenfeld has immersed himself in the issues and taken whatever steps he deemed necessary to assure continuous, steady progress toward a trial on the liability issue. Within four days of receipt of the original papers in this consolidated proceeding, Judge Blumenfeld held his first conference with the various counsel involved. The initial pre-trial conference was held approximately one month later. Since that time, more than twelve conferences and hearings have been held in an effort to speed discovery, narrow the issues, and prepare the cases for trial. In short, Judge Blumenfeld has from the outset assumed control of

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*This Circuit has acknowledged it to be ". . . a complex and protracted private antitrust action." *In re Master Key Antitrust Litigation,* 528 F. 2d 5, 7 (2d Cir. 1975).

this litigation, striving to make manageable that which at least the defendants have contended is inherently unmanageable, and has brought these cases to the point where two of the defendants have settled and trial as to the remaining defendants is scheduled to commence on September 14, 1976.

THE EMHART SETTLEMENT

In June of 1975, counsel for Emhart and counsel for plaintiffs concluded months of settlement negotiations by entering into a settlement agreement to dismiss Emhart as a defendant in each of the lawsuits discussed above. Under the terms of the agreement, Emhart has agreed to pay $7,500,000 plus accrued interest from August, 1975. The agreement provides that the settlement fund is to be allocated 80% to the public entities classes and 20% to the private entities class. (AII 1034; 1038) Exxon's unsupported suggestion (Class Members—Appellants' Brief, at 6-7; 19) that that 80%-20% allocation was an arbitrary "bootstrap" attempt to meet alleged demands of the public entities classes for a $6,000,000 settlement is simply—and categorically—not true. The principal sum was paid into an escrow account to be held until acceptance of the settlement agreement by class members and approval pursuant to Rule 23(e), *Fed. R. Civ. P.*, by the District Court. As discussed *infra*, extensive individual notice was given to members of the public and private classes on March 29, 1976, well in advance of the June 2, 1976 fairness hearing before Judge Blumenfeld. Following that hearing, at which appellant Exxon appeared and participated, the settlement was approved. (AII 837-840) Thereafter, Judge Blumenfeld entered an appropriate order of final judgment and

dismissal of Emhart with prejudice, accompanied by a Certification pursuant to Rule 54(b), *Fed. R. Civ. P.* (AII 946-950) It is from that order that Exxon appeals.

Exxon also appeals from approval of a separate settlement by Ilco. Almost a year after the Emhart settlement agreement was reached, Ilco entered into its own settlement. The Emhart and Ilco settlements are unrelated, and neither is dependent upon or affected by the other. Differing substantially from the Emhart settlement, the Ilco settlement was approved by the District Court after a separate fairness hearing, devoted exclusively to the Ilco agreement. For the convenience of this Court and counsel other than those representing Ilco and Emhart, Exxon's separate appeals have been consolidated. Because each separate settlement agreement is to be judged on its own merits, and because Emhart is not a party to the Ilco settlement just as Ilco is not a party to the Emhart settlement, we will not treat the Ilco settlement in this brief.

SUMMARY OF ARGUMENT

This is an appeal by Exxon, a member of the plaintiff private entities class, from the order of Judge Blumenfeld of the District Court for the District of Connecticut approving the settlement agreement between all plaintiffs and defendant Emhart. Only Exxon, of the more than 40,000 individual class members, objects to the settlement and asks this Court to find that the District Court abused its discretion when it found such settlement agreement to be fair, adequate and reasonable.

Exxon does not object to the total amount of the settlement. It readily admits that such amount is fair, reasonable and fully supported by the evidence before the District

Court. Rather, Exxon bases its appeal on alleged inadequacies in the data supporting the allocation of the settlement fund between the public and private classes. However, despite ample opportunity, Exxon has failed to present any concrete and relevant evidence which suggests that the allocation is other than fair and reasonable or that the District Court abused its broad discretion in approving the Emhart settlement.

At the fairness hearing before the District Court and in the briefs of counsel for both plaintiffs and Emhart in support of the settlement agreement, the allocation provision was amply supported by the contemporaneous sales data of Emhart, an independent analysis of defendants' master key installations, the extensive individual notice to class members, the small number of opt-outs from the classes, and the acceptance, after exhaustive discovery, by experienced counsel with extensive backgrounds in antitrust litigation. The District Court, which has been intimately familiar with this litigation for more than six years, found that such data amply established the fairness and reasonableness of the settlement in its entirety, including the allocation between public and private classes.

In an attempt to contradict the Emhart statistics, Exxon submits irrelevant industry-wide data, not closely enough related to the limited membership of the private entities class or the sales volume of master key systems to be useful in determining a proper allocation. Exxon also raises the spectre of a conflict of interest, consisting of the representation of the private class entities by an attorney who represents some of the public class entities as well. Yet, Exxon points to no evidence which remotely suggests that such potential conflict has been real, or that the interests of the private class entities have been adversely affected. Accordingly, in the absence of such relevant contradictory

evidence, and in the absence of a showing that Judge Blumenfeld abused his broad discretion, the judgment of the District Court should be affirmed.

ARGUMENT

I. THE DETERMINATION OF THE DISTRICT COURT THAT THE SETTLEMENT AGREEMENT IN ITS ENTIRETY IS FAIR AND REASONABLE MAY ONLY BE DISTURBED UPON A CLEAR SHOWING THAT THE DISTRICT COURT ABUSED ITS DISCRETION

The decision to approve a settlement of a class action is left to the sound discretion of the trial court, as this Circuit held in *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974):

> As we evaluate the settlement approved in this case, this Court must remain mindful that:
>
> > Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.
>
> Ace Heating & Plumbing Co., Inc. v. Crane Company, 453 F. 2d 30, 34 (3d Cir. 1971)
>
> > In fact so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion. (citations omitted) (495 F. 2d at 454-455)

Accord, Connecticut Railway & Lighting Co. v. *New York, New Haven & Hartford Railroad Co.*, 190 F. 2d 305, 308 (2d Cir. 1951); *In re Prudence Co., Inc.*, 98 F. 2d 559 (2d Cir.), *cert. denied sub nom. Stein* v. *McGrath*, 306 U. S. 636 (1938).

In exercising that discretion, trial courts are mindful of the fact that settlement is "a course long favored by the law." *Weight Watchers of Philadelphia* v. *Weight Watchers International*, 455 F. 2d 770, 773 (2d Cir. 1972); *Williams* v. *First National Bank*, 216 U. S. 582, 595 (1910). As Chief Judge Caffrey stated in approving settlement of a group of class actions, "It should be noted at the outset that there is a policy in favor of settlement of lawsuits, particularly when they are potentially protracted and will constitute highly expensive litigation." *In re Revenue Properties Co., Ltd.*, MDL 32 (D. Mass., January 26, 1972).

In considering the adequacy of the terms of a settlement, there is "a strong initial presumption that the compromise is fair and reasonable." *Josephson* v. *Campbell*, 1967-69 CCH Fed. Sec. L. Rep. ¶ 92,347 (S. D. N. Y. 1969); *Levin* v. *Mississippi River Corp.*, 59 F. R. D. 353, 361 (S. D. N. Y.), *aff'd sub nom. Wesson* v. *Mississippi River Corp.*, 486 F. 2d 1398 (2d Cir. 1973); *Feder* v. *Harrington*, 58 F. R. D. 171, 174-75 (S. D. N. Y. 1972).

The general criteria to be applied in evaluating a proposed settlement is well established in this and other circuits. A settlement should be approved if it is fair, reasonable and adequate. These terms are general and cannot be measured scientifically. "The evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice." *City of Detroit* v. *Grinnell Corp., supra,* at 468. Basic to this determination is a comparison of the terms of the settle-

ment against the probability of plaintiffs' success and the likely rewards of a trial of the case on the merits. *Protective Committee* v. *Anderson,* 390 U. S. 414, 424-425, *reh. denied,* 391 U. S. 909 (1968); *State of West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710, 740 (S. D. N. Y. 1970), *aff'd,* 440 F. 2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U. S. 871 (1971); Dole, *The Settlement of Class Actions for Damages,* 71 Colum. L. Rev. 971, 981 (1971); Haudek, *The Settlement and Dismissal of Stockholders' Actions,* 23 Sw. L. J. 765, 793 (1969). The court must determine whether the amount of the settlement falls within a "range of reasonableness," which has been defined by Judge Friendly as "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion. . . ." *Newman* v. *Stein,* 464 F. 2d 689, 693 (2d Cir.), *cert. denied sub nom. Benson* v. *Newman,* 409 U. S. 1039 (1972).

In considering settlements, it is not necessary or desirable for courts to decide cases on the merits. This principle was set forth in *State of West Virginia* v. *Chas. Pfizer & Co., supra,* where District Judge Wyatt said:

> There is a further important principle to be observed in respect of judicial consideration of proposed settlements. This is that the judge does not try out or attempt to decide the merits of the controversy. "Any virtue which may reside in a compromise is based on doing away with the effect of such a decision." (citations omitted) (314 F. Supp. at 741)

On appeal, this Court agreed, noting that the court ". . . need not and should not reach any dispositive conclusions

on the . . . unsettled legal issues which the case raises. . . ." *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d at 1086.

The Fifth Circuit, among others, is in accord. In *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567 (5th Cir. 1960), the court provided a useful statement of the policy behind the power to compromise:

> The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise. (284 F. 2d at 571)

The foregoing was cited by this Court with approval in *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d at 1085-1086.

II. THERE IS NO OBJECTION TO THE AMOUNT OF THE SETTLEMENT FUND

Neither Exxon nor any other of the more than 40,000 class members has objected to the total amount of the settlement. The proposed settlement involves payment of

$7,500,000, plus interest accrued from the date of the escrow. This figure represents 8% of all contract hardware sales by Emhart occurring within the four-year period not barred by the applicable statute of limitations. In reality, the recovery by plaintiffs will be higher than 8% because sales to class members represent less than the totality of sales during the class period, some class members have opted out of the class, and some class members will probably fail to file claims.

It is interesting to note that Exxon does not question reliance on Emhart's sales statistics for purposes of determining the amount of the settlement fund. Nevertheless, this same data inexplicably becomes inadequate in Exxon's eyes when it is used to determine the allocation of that fund.

III. THE DISTRICT COURT PROPERLY EVALUATED ALL ASPECTS OF THE SETTLEMENT

A. The Settlement Is Based On The Best Available Data: The Contemporaneous Sales Records Of Emhart Corporation

The amount of the settlement and its allocation between public and private class members were derived from records of Emhart for the years involved in this litigation. These records were made and kept in the regular and ordinary course of Emhart's business; they were contemporaneous documents, prepared before this litigation was instituted. Therefore, they are Emhart's best source of information for tracing its contract hardware to types of end users and are the most logical means to determine the allocation of the settlement fund between public and private classes. These annual summaries of contract hardware sales by Emhart utilized the Dodge Project Classification system, from which the amount of sales to public and private build-

ings included in the respective class actions could be determined. The following categories were used:

Public	Private
Education and Science	Office and Bank Buildings
Hospitals and Health Buildings	Apartments
Dormitories	Hotels and Motels
Public	

The annual summaries showed that sales of contract hardware for private buildings varied from 15.2% to 20.5% of the total sales to the categories listed above for the years 1965 through 1968, inclusive, thus establishing the 80%-20% allocation. (AII 536) It was recognized that the "Education and Science" and "Dormitories" categories contained some private school construction. However, information obtained from the Department of Health, Education and Welfare showed that public school enrollment accounted for more than 90% of total elementary and secondary school enrollment and more than 77% of students in institutions of higher learning, suggesting that the distortion caused by inclusion of such amounts in the public category is minimal. (AII 534)

It is well to remember that the product involved in this litigation, contract hardware, is not generally sold for residential construction, which constitutes the bulk of private construction. Nor is there any private class for any group other than private builder-owners of hotels, motels, office buildings and apartment buildings. Accordingly, a very large segment of private construction, which would appear in most industry-wide data, has no relevance to the limited private class certified by Judge Blumenfeld. On the other hand, almost all construction by governmental entities

utilizes contract hardware. This explains the general relationship between sales to public and private classes.

The 80%-20% allocation also gave recognition to other factors which are less easily quantified. For example, the evidence in this case purportedly indicates that the alleged illegal overcharges were higher on extensions of master key systems than original installations. Extension work is concentrated in the public sector, especially schools and colleges. This factor tends to counterbalance any minor distortion resulting from the inclusion of some private schools in the public category.

The thrust of Exxon's argument is that the Emhart sales statistics are not relevant because they present information about the sales experience of only one defendant in this action in which conspiracy is alleged. (Class Members—Appellants' Brief, at 37-39) Exxon properly points out that members of the class are entitled to recover from the settlement fund if they purchased contract hardware from *any* of the defendants. The settlement agreement so provides, and such would be true after the liability trial if—but only if—plaintiffs sustained their horizontal conspiracy claims. No one in this litigation has ever even suggested that defendants are not jointly and severally liable after proof of a conspiracy. With reference to the fairness hearing itself, liaison counsel for plaintiffs, (AII 531) counsel for Emhart, (AII 689-690) and Judge Blumenfeld (AII 706) all acknowledged that if liability were found after trial there would be joint and several liability among defendants. But that fact is not controlling in determining whether to approve plans of allocation in a settlement context where the settling defendant has denied involvement in any conspiracy, and certainly does not transform a plan for allocation based on data from only the settling defendant into an error of law.

Nevertheless, in an apparent effort to avoid the need to show a clear abuse of discretion, Exxon attempts to transform this sensible and reasonable basis for allocation in a settlement context (*see infra*) into an error of law. Thus it asserts that (Class Members—Appellants' Brief, at 27):

> The District Court's reliance on the "Emhart data" was a substantial error of law: The defendants are jointly and severally liable in this conspiracy action, and data relating to the sales pattern of only one settling defendant is irrelevant to the allocation of the settlement proceeds.

Exxon is thus attempting to equate liability in a litigated context with approval of an allocation in a settlement context, and this Circuit has made it abundantly clear that such equations are inappropriate. *State of West Virginia* v. *Chas. Pfizer & Co., supra.* Accordingly, it is not an abuse of discretion as a matter of law to approve a settlement based on such data.

Moreover, in this case there are practical reasons for not requiring that sales information be produced by all defendants prior to approval of the settlement. As the District Court tersely, and correctly, said:

> There are two responses to this argument. The most pragmatic response is that the combined sales figures are simply not available at this time, if such figures exist at all.[5] The second response is that the objectors have not demonstrated any reason to assume that the figures of the other defendants would differ materially from those presented by Emhart.[6]
>
> [5]The sales figures of the defendants Sargent and Eaton were the subject of a Rule 37 motion heard the same day of the settlement fairness hearing. Sargent has

maintained that its records do not clearly delineate the private or public nature of the ultimate purchaser, or at least that the figures would be extremely difficult to distill.

[6]And this is despite the fact that at least one of the objectors, Exxon Corporation, has been receiving the active assistance of one of the nonsettling defendants, Eaton Corp. Arguably this cooperation would have included some evidence of a different ratio, if one existed. (AII 839)*

The determination of a reasonable settlement amount is an imprecise process, subject to many variables. Yet the Emhart sales figures alone were deemed by all, including Exxon, as satisfactory for this purpose. No valid evidence has been presented suggesting that they are any less suitable for the purpose of determining the allocation between public and private classes.

Exxon appears to make much of the fact that the Emhart data were submitted to Judge Blumenfeld by counsel for plaintiffs, rather than counsel for Emhart, when it states:

> The District Court ignored the fact that Plaintiffs' Liaison Counsel and *not Emhart,* presented the "Emhart data" purportedly supporting the 80%-20% plan of allocation. (Class Members—Appellants' Brief, at 14, n. 6)

We do not understand why this should be noteworthy. These records—along with millions of others—had been inspected at Emhart's offices by teams of lawyers for plain-

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* To the contrary, a portion of Eaton's designation of trial evidence, which was not produced until after the fairness hearing, reflects a greater than 80%-20% ratio of sales to members of the public versus private classes. (AII 956-957)

tiffs in routine document inspections long before the settlement. They were no secret. Plaintiffs filed their memorandum in support of the settlement on May 15, 1976, and referred to the Emhart data on which the allocation was premised, appending thereto a summary of the data (AII 523-537). Because Emhart's memorandum in support of the settlement was not filed until May 27, 1976, well after plaintiffs' memorandum was filed, there was no need for counsel for Emhart to do more than refer to plaintiffs' memorandum in this regard. (AII 541-570) Thereafter, plaintiffs' counsel filed copies of the Emhart documents. (AII 592-601) The fact that the Emhart data came from Emhart's files is uncontroverted, and we fail to perceive the significance attached by Exxon to which party to the settlement agreement physically filed the Emhart data.

B. The Contemporaneous Sales Records of Emhart Corporation Tend To Be Supported By A Post Settlement Agreement Analysis By Non-Settling Defendants Of Master Key Installations

It is interesting to note that the non-settling defendants retained Price Waterhouse & Co. to conduct a study, *inter alia,* of the types of jobs reflected in the records of contract hardware distributors which were made available through discovery in this litigation. The Price Waterhouse analysis (referred to by Exxon as the "Dykeman Study" in Class Members—Appellants' Brief, at 22) of 3,500 individual jobs reflects that hotel, motel, apartment and office building jobs (which comprise the private class) account for 10.23% of the jobs, while those jobs within the public classes comprise 50.57%.* (AII 591) In other words, the ratio of the number of jobs employing master key systems

*The remaining jobs were either unclassified as to end user or did not fall within any of the classes certified by Judge Blumenfeld.

in public versus private construction is approximately 80% to 20%.

This study had not been prepared at the time of the negotiation of the settlement agreement, and it is therefore somewhat curious that Exxon attacks so vigorously the relevance of this study as a basis for the settlement. As plaintiffs' counsel stated at the June 2, 1976 fairness hearing, they did not become aware of the existence of the study until April 20, 1976, almost a year after the signing of the settlement agreement. (AII 748-749) Accordingly, it was submitted to the District Court not as data on which the settlement was based, but merely as evidence which tends to corroborate the Emhart sales statistics. Emhart readily concedes that this study was not prepared for the purpose of determining the allocation between public and private classes. The fact that it nevertheless tends to support that allocation is, therefore, all the more persuasive because it is less susceptible to a charge of being self-serving.

Exxon attempts to discredit this study by speculating that it did not employ a scientifically chosen random sample of master key dealers throughout the country and produced data in terms of the number of contract hardware "jobs" completed for members of the public and private classes without determining their dollar volume. (Class Members—Appellants' Brief, at 22; AII 823-825) However, even with those limitations, Exxon has produced no evidence which suggests that the results of the study are inaccurate. To the contrary, the fact that its conclusions correspond with those derived from an analysis of the Emhart sales data lends further credibility to the Price Waterhouse study and the Emhart statistics themselves.

It should be noted that the Emhart data do not suffer the alleged deficiencies which Exxon finds in the Price Waterhouse analysis. The Emhart statistics are expressed

in terms of dollars, not "jobs", and are based on comprehensive sales data, not on a random sampling.

C. Exxon's Objections To The Emhart Sales Statistics Are Without Merit

Exxon's quarrel with the Emhart sales data can only be regarded as trivial and capricious. It notes that while the figures presented in plaintiffs' memorandum in support of the settlement refer to "sales" figures as the basis of the 80%-20% allocation, the supporting affidavit of Karol K. Gibbs suggests that the data really reflect "contract orders". (Class Members—Appellants' Brief, at 19) Even assuming there is a real distinction, the statistical impact is undoubtedly negligible; it would be a strange company indeed that did not fill virtually all its "orders", thereby converting them into "sales".*

(In this context Exxon states that ". . . the Emhart records relied on are *not* contemporaneous sales records." (Class Members—Appellants' Brief, at 19) We understand Exxon to be saying that there may be a difference between orders and sales. We do not understand Exxon to be saying that the records were not prepared contemporaneously with the receipt of the orders. If Exxon is suggesting that these records are not contemporaneous, it is simply in error. We state categorically that the Emhart data are contemporaneous records; they were prepared by Emhart, in the regular course of its business, in and for the years 1965-1968, and before this litigation was instituted.)

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*Purely as a matter of administrative convenience, Emhart's clerks categorize by types of end users its sales of contract hardware as well as other data of an administrative nature when the orders are received, rather than when the hardware is shipped.

Also, Exxon notes that the classification system used is not designed to delineate sales to public versus private bodies.* Therefore, it claims that distortions result from the inclusion of private construction, such as private educational buildings and private hospitals, in the public category.** (Class Members—Appellants' Brief, at 19-22) Two answers to this criticism may be given. First, the Emhart figures suggest that a recovery greater than 80% by the public classes would be appropriate. Not only did sales to the public classes in all but one of the relevant years exceed 80%, but also, as discussed *supra,* the evidence suggests that the alleged illegal overcharges were greater on extensions to existing master key systems, found primarily in the public classes, than on installations of new ones. Second, even conceding that some private schools and hospitals are included in the public classes, their impact upon the total figures is minimized by the fact that they are *not* within the private class, and so are not entitled to inclusion in the figures for private sales. Also, as mentioned *supra,* the vast majority of school construction is public, resulting

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*Presumably this is the point Exxon is trying to make when it says, "Significantly, the District Court did not identify any business records maintained by Emhart in which an 80%-20% division of sales between public-bodies and private-entities can be found." (Class Members—Appellants' Brief, at 13) If this is not Exxon's point, we fail to understand why there is anything "significant" about Judge Blumenfeld's shorthand reference to the Emhart data when he stated, "The proposed allocation is, in fact, based on the historical allocation of Emhart's sales, as demonstrated by its record of orders during the period in question." (AII 838) This is particularly so since everyone—including Exxon—was and is aware that the court was referring to the Emhart data which Exxon challenges.

**This appears to be what Exxon means when it states, "No business records of Emhart supporting any allocation between public-body and private-entity purchases, much less the arbitrary 80%-20% 'formula', were presented." (Class Members—Appellants' Brief, at 21) It is established without question that the Emhart data were before the District Court before it approved the Emhart settlement. (AII 536; 592-601; 838)

in minimal distortion of the sales figures for the educational and dormitory categories.

D. Despite Ample Opportunity To Do So, Exxon Has Failed To Come Forth With Concrete And Relevant Data To Support Any Other Allocation: The Data Submitted By Exxon Are Irrelevant To The Question Of The Fairness Of The Proposed Allocation

In an attempt to refute the sales data of Emhart, Exxon has presented various building statistics which it claims prove that the Emhart records are inadequate as a means of allocating the settlement fund. (AII 848) However, this alleged "proof" is itself unrelated to the subject matter of this litigation and the claims asserted herein. Consequently, it is irrelevant at best, if not grossly misleading.

Exxon's data is deficient in at least two respects. First, it relies on Bureau of Census figures of the total dollar value of all new construction completed during the relevant years. These numbers include private hospitals, private schools, religious buildings, industrial buildings, garages, warehouses, and other commercial buildings, none of which is included within the private class or this litigation. (AI 325-336; 399-400) Exxon's figures also include multifamily residential construction; that is, residential buildings with two or more units. However, it is only larger apartment projects which utilize master key systems. Thus the total dollar amount of private construction which might possibly utilize master key systems is appreciably overstated. More fundamentally, Exxon has presented no evidence that the total dollar value of all construction in a given sector of the economy is a reliable indicator of the dollar value of master key systems installed, and the evidence adduced through

discovery makes manifest that such is not the case.* Nor has Exxon produced any evidence regarding what percentage of master key systems employed in these buildings were purchased from any of the defendants herein.** Therefore, it must be concluded that the figures presented by Exxon are irrelevant as a means of estimating the ratio of sales to members of the public and private classes.*** Their inherent deficiencies in this context would make reliance thereon questionable under any circumstances. But given the availability of actual sales data of the settling defendant, reference to such irrelevant statistical data as that put forward by Exxon would be totally unjustified and improper.

In short, Exxon has presented no relevant data which even remotely suggests that the fairness of the settlement is not fully supported by the evidence, despite ample

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*For example, in depositions taken in this litigation, evidence of this relationship was given which illustrates the basic error of Exxon's simplistic position. It was stated that contract hardware represents only approximately .25% of private construction costs (*see* deposition of Anthony Scavo, Vice President in charge of construction, Lefrak Corporation, dated October 29, 1973, at 14) (AI 44-45) and "a fraction of 1% to as much as 4% or 5%" of public construction costs. (*See* deposition of Robert C. Belt, Department of Public Property, City of Philadelphia, dated November 21, 1973, at 34). (AI 54-56) Thus, even if Exxon's figures with their inflated value of private construction are used, we find that, assuming an average construction value (in millions of dollars) during the relevant period of 26,000 for public and 26,000 for private, (AII 848) then the value of contract hardware installed is approximately (26,000 x 1.00%) or 260 for public construction and (26,000 x .25%) or 65 for private construction. These figures, utilizing the lower percentage of total cost of contract hardware in public construction and ignoring the Emhart data and such factors as the greater percentage of extensions in the public sector, etc., thus reflect an 80%-20% ratio.

**There are several manufacturers of contract hardware other than defendants.

***Like statistics were available to Emhart, yet it found them insufficient as a means of tracing its products to end users and undertook the additional effort and expense to construct the specific figures.

opportunity to do so. It makes no claim that Judge Blumenfeld precluded its counsel from participating fully in the hearing on the Emhart settlement, and we do not understand Exxon to say that the hearing itself was anything less than an impartial airing of issues related to the Emhart agreement. Nor do we read Exxon's brief as asserting a claim that the "District Court prejudged the issues before it" with regard to the Emhart settlement, since the only references to parts of the record which allegedly support this highly questionable contention involve the Ilco settlement proceedings. (Class Members—Appellants' Brief, at 36) If in fact such a claim is being made with regard to the Emhart settlement, we emphatically deny it and suggest that the record is totally devoid of any support for such a claim.

Exxon's main complaint seems to be that Judge Blumenfeld did not provide it with sufficient time to prepare and file post-hearing papers. (Class Members—Appellants' Brief, at 9-10) While the time allowed to file post-hearing papers may not have suited the convenience of Exxon's counsel, the facts remain that its post-hearing Memorandum was timely filed and it thereafter filed a Motion for Reconsideration, supported by affidavit. (Class Members—Appellants' Brief, at 10) Exxon learned of the 80%-20% allocation upon receipt of the March 29, 1976 notice, over two months before the fairness hearing, and was thus afforded considerable opportunity before the hearing to confer with plaintiffs' liaison counsel, to review the record, to consult with its experts and to undertake analyses regarding the settlement.

It is thus particularly inappropriate for Exxon to argue, as it does throughout its brief, that it was somehow denied sufficient opportunity to apprise itself of relevant matters relating to the allocation and to respond thereto.

(Class Members—Appellants' Brief, at 9-10; 19; 32-33) The refutation of Exxon's claims in this regard is premised not on conjecture but on historical fact. The historical fact is that Samuel H. Seymour, Esq., an attorney also representing members of the private entities class, was able to apprise himself of the basis for the allocation and submit both a memorandum and an affidavit, all by the date of the fairness hearing on June 2, 1976. (AII 573-587) Mr. Seymour argued in his memorandum that:

> On the basis of the information furnished us by class counsel, and our own independent study, we must, at this time, object to the proposed allocation on the ground that it appears to be manifestly unfair and inadequate to the private builder-owner class. . . .* As a result of conversations and correspondence with counsel for the class representatives, it appears that the proposed plan of allocation is based on settling defendant Emhart's analyses of its contract hardware sales to the private and public sectors over the period from 1965-68. (AII 581-582)

The Seymour memorandum is dated May 12, 1976, almost three weeks prior to the fairness hearing. Counsel for Exxon could, like Mr. Seymour, have conversed and corresponded with liaison counsel for plaintiffs, and could have requested and obtained the Emhart data on which the allocation was based. Counsel for Exxon could, like Mr.

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*Although he at first objected to the allocation, Mr. Seymour stated later in the fairness hearing, "I also am satisfied from my discussions with Mr. Freeman and also from reading the Gibbs affidavit carefully that at least as to the questions I raised about the accuracy of the Emhart statistics I'm satisfied now that I understand the basis of those statistics and I no longer have those reservations. . . . And I think that based on those considerations I would, for the purposes of this settlement, not any longer oppose the 80/20 split." (AII 752-753)

Seymour, have undertaken their own independent study and prepared an affidavit prior to the fairness hearing. But counsel for Exxon sat back and did none of these things, even though both Exxon and its counsel are experienced in such matters. In short, since Exxon has demonstrated no reason why it should not have taken the steps which Mr. Seymour took to obtain and analyze information related to the allocation prior to the fairness hearing, it should not be able to turn its lack of diligence into a basis for arguing that Judge Blumenfeld abused his discretion.

The agreement of all other parties ought not to be frustrated by Exxon's unsubstantiated complaints. This Court has emphasized that an objector cannot thwart a settlement by making "unsupported suppositions", and that an objector must demonstrate a factual basis for its objections. In *City of Detroit* v. *Grinnell Corp., supra,* this Court stated:

> In general the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pretrial proceedings.

This Court concluded:

> To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. (495 F. 2d at 464)

The above considerations apply with equal force to Exxon here.

E. The Possibility That Private Class Members Passed On All Or A Part Of Any Putative Overcharge, Whereas The Public Class Members Did Not, Further Supports The Allocation and Undercuts Exxon's Objections

It may be argued that members of the private builder-owner class passed on all or part of any alleged overcharge. Many of them build for profit and resell their buildings or rent their rooms. (AII 682) The public entities classes, on the other hand, are comprised of end users; they are not in the business of building for profit. Were it to be shown at trial that members of the private entities class passed on all or a portion of any overcharges, it is possible that their recovery would correspondingly be eliminated or reduced, *see In re Master Key Antitrust Litigation, supra,* at 12, n.11 (2d Cir. 1975), whereas the same would not be true for the public entities class members. In the context of settlement, an allocation which reflects such possibility is well within the discretion of the District Judge to approve. Indeed, it was on this basis that the settlement in *Pfizer* was approved by Judge Wyatt and affirmed by this Court. There the wholesaler-retailer class, which had by far the largest share of purchases from defendants, was allocated by far the smallest share of the settlement fund. This was done because the wholesaler-retailer class appeared to have passed on any overcharge and, accordingly, may not have been damaged by any overcharge. As this Court stated:

> The most interesting and difficult issue which this appeal presents is the use of the "passing-on" doctrine as regards the claims of the wholesalers and retailers, not as a defense to escape liability, as is normally the

> case, but rather as a basis for determining the distribution of the damages recovered among various plaintiffs. (440 F. 2d at 1086)

Neither Judge Wyatt nor this Court decided the ultimate question regarding this application of the passing-on doctrine, for in a settlement context it was neither necessary nor appropriate to do so. What this Court did decide was that the possible bar of claims by private class members who may have passed-on any illegal overcharges was a factor which would support the allocation of a smaller portion of a settlement fund to such a class and that ". . . the district court was well within its discretion" in approving a settlement based largely on such a possibility. 440 F. 2d at 1088.

As in *Pfizer,* the possibility here that members of the private builder-owner class may have passed on all or part of any overcharge is a factor which supports an allocation which assigns a smaller portion of the settlement fund to such class and which places approval of that settlement well within the discretion of Judge Blumenfeld.*

F. The Extensive Notice To Class Members And Few Opt-Outs Indicate The Fairness Of The Settlement

Notice of the proposed settlement, which clearly indicated the 80%-20% allocation provision of the agreement,

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*The distribution of the allocated funds to and among the members of the separate classes has been reserved for a future hearing and further order of the District Court. (AII 1036) This was also the situation in *State of West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710, 730 (S. D. N. Y. 1970), *aff'd,* 440 F. 2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U. S. 871 (1971).

was given individually to a vast number of potential claimants. The notice stated the following:

> The settlement agreement provides that the fund shall be allocated among the classes as follows:
>
> The state-wide and national governmental classes: eighty (80%) per cent.
>
> The private builder-owner class: twenty (20%) per cent. (AI 400)

Pursuant to the District Court's order, 17,729 copies of the "Notice of Class Action and Partial Settlement with Respect to Litigation Involving Finish Hardware" were sent to individual members of the class consisting of private builder-owners of motels, hotels, apartment buildings and office buildings. (AII 511) Such members were identified from defendants' lists of master key projects installed since 1950 and from lists of members of the Building Owners and Managers Association. Extensive individual notice was given also to members of the public entities classes in accordance with the District Court's directive, so that approximately 20,000 public entities received individual notice. (AI 404-408)

In addition to this substantial effort to give individual notice to as many potential claimants as possible, notice was given by publication on March 29, 1976, in all regional editions of the Wall Street Journal.* (AI 406)

In evaluating the fairness of the agreement, including the allocation provision, the District Court properly found persuasive the fact that relatively few members of the

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*The daily circulation of the Wall Street Journal, all editions, is approximately 1,400,000. *See Ayer's Directory of Publications* (108th ed. 1976).

classes in relation to the number who received notice of the proposed settlement opted out.* Of the 17,729 individual notices sent to members of the motel, hotel, office building and apartment building class and all those who received notice by publication, only 177, or approximately 1% of the class, have elected to be excluded from the class. (AI 478-479) In the public entities classes, only 447 class members of the approximately 20,000 notified have elected to be so excluded. (AI 443-477) Remaining in the private builder-owner class and not objecting to the settlement are a number of large, publicly-held corporations which are well able to protect themselves. This, too, strongly suggests a finding that the proposed settlement should be approved. As this Court observed in *City of Detroit* v. *Grinnell Corp., supra,* at 462:

> The favorable reception of the settlement offer at the hands of both plaintiffs and the individual attorneys who had little or nothing to do with the negotiation of the settlement is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion.

G. The Fairness Of The Settlement Is Indicated By The Fact That All Counsel For All Plaintiffs Have Approved It

In evaluating the fairness of the terms of the settlement agreement, it is of considerable significance that *all* counsel for *all* plaintiffs have approved the settlement. In the first place, they are intimately familiar with the litigation, having expended an extraordinary amount of time and

*Exxon, of course, could have opted out of the class.

effort on these cases over the last several years. Moreover, co-liaison counsel for plaintiffs and their firms have probably had as much experience in treble damage antitrust litigation as any lawyers in the country. Acceptance—without exception—by such experienced and eminent counsel is a factor entitled to great weight and is strong evidence that the settlement is fair, adequate and reasonable. *See Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834, 838 (E. D. Pa.), *modified sub nom. Ace Plumbing & Heating Co.* v. *Crane Co.*, 453 F. 2d 30 (3d Cir. 1971) (approval of settlement by overwhelming majority of plaintiffs' counsel is factor to be considered); *City of Detroit* v. *Grinnell Corp., supra,* at 462; *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. at 740.

H. Knowledge Of A Range Of Recovery Prior To Deciding Whether To Accept A Settlement Offer Fosters The Policy Favoring Settlement. Conversely, To Require Filing Of Individual Proofs Of Claims Before Establishing The Allocation Between Public And Private Classes Would Frustrate That Policy

The settlement proposal presented to the class members called for the payment by Emhart of $7,500,000, plus accrued interest from August, 1975, to be allocated 80% to the public entities classes and 20% to the private entities class. Knowing the size of the fund from which its class would be compensated, each counsel and each state could roughly approximate the amount which each class member would receive. Accordingly, whether to accept the settlement became an informed decision. (AII 681-682, 742-743) If the allocation were not known in advance, this calculation

would not be possible. Hence, allocation facilitated settlement and fostered the policy in favor of settlement.

Exxon says that the allocation of the fund should await the filing of individual proofs of claims. But that procedure would make the decision whether to accept the settlement offer less informed and, accordingly, would make settlement more difficult. In addition, it would create needless delay of the final approval of the settlement. The reliable data available in this case which establishes the division of sales between private and public classes makes resort to individual claims forms at this stage unnecessary and, considering the appreciable expense to the class members such a process would entail, undesirable as well. Indeed, at least one disgruntled class member in the *Pfizer* case sought to elevate to constitutional dimension the *failure* to state in the class notice what the allocation among classes was to be. *See* Petition For a Writ of Certiorari To The United States Court of Appeals For the Second Circuit at 6-7, *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U. S. 871 (1971). While that contention obviously goes too far, it does serve to underscore at least the desirability of providing such information to class members where possible and puts in proper perspective Exxon's remarkable contention that this commendable policy somehow constitutes a clear abuse of discretion by the District Judge.

I. Exxon's Allegation Of A Potential Conflict Of Interest Arising From Representation Of The Private Class By One Of The Attorneys For The Public Classes Is Totally Unsupported By Any Actual Evidence Of Such Conflict

In this consolidated proceeding, one of plaintiffs' two liaison counsel represents both public and private class

members. Exxon urged the court below to disapprove the allocation formula because of this alleged potential conflict of interest. (Class Members—Appellants' Brief, at 39-41) Yet, neither at the hearing nor in any of its subsequent pleadings has it presented any suggestion that this potential conflict has in any way been detrimental to the private class. Nor did the District Court, far more familiar with these proceedings than Exxon, perceive any unfairness resulting from such alleged potential conflict of interest. While the matter conceivably might have been one of more concern had this settlement allocation been determined without reference to objective, reliable sales data, the availability of such data, perhaps unique in this case,* caused the District Court to conclude properly that the settlement was fair and reasonable. As Judge Blumenfeld stated:

> While this court does not ignore the apparent conflict, and while it will take steps to remedy the situation,** the appearance of such a conflict does not automatically require the disapproval of the settlement, especially in the face of the objective evidence of fairness presented. (footnote omitted) (AII 839-840)

Such data persuasively rebut Exxon's attempt to cast suspicion upon the fairness of the settlement by asserting the mere existence of a potential conflict without present-

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*Such statistics were not available in the Plumbing Fixtures cases or the Gypsum cases. (AII 683; 740-741; 744-745)

**To assure that this potential conflict does not become a problem in the future, Judge Blumenfeld has now entered an "Order Appointing Committee of Counsel For Purposes Of Allocation And Distribution of Recoveries On Behalf Of The Private Plaintiff Class", dated August 11, 1976. (AII 1028-1029)

ing any evidence or even alleging that it had *any* effect thereon.*

In *Pfizer* this Court summarily disposed of a similar contention:

> The other points raised by appellants appear to be clearly without merit and can be dealt with summarily. Appellants make several rather vague charges of conflict-of-interest as to various counsel for both the wholesaler-retailer class and the government plaintiffs. The district court specifically found that "from the affidavits submitted and [from] the Court's knowledge of the progress of these actions, it is clear that the proposed compromise was the result of good faith bargaining at arms' length." The appellants have suggested nothing of substance which would cast doubt on this conclusion. (440 F. 2d at 1091)

In our case it is even more apparent that a vague charge of conflict of interest is a mere make-weight because the allocation was not the result of bargaining by counsel but of analysis of objective data. Accordingly, any suggestion that the settlement agreement is somehow tainted by such an alleged conflict must be dismissed.

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*As Mr. Montague stated at the fairness hearing: "Thirdly, I believe there is no conflict, mainly because the allocation between the classes here was not arbitrarily negotiated, but it was based on actual sales statistics. So there was no opportunity to even assert any type of conflict." (AII 746) Indeed, since Mr. Montague represents all of the private class members but considerably less than all of the public class members, it would appear as a matter of abstract logic that if he had any incentive to favor either class—and the record is barren of anything to support such a supposition short of Exxon's unfounded assertion—the incentive would be to favor the private class.

IV. FAILURE TO AFFIRM THE DISTRICT COURT'S APPROVAL OF THE SETTLEMENT AGREEMENT WILL DENY PLAINTIFFS A CERTAIN RECOVERY AND DENY EMHART ITS RIGHT TO END ITS PART IN BURDENSOME AND EXPENSIVE LITIGATION

A. Plaintiffs Face Serious Obstacles At Both The Liability And Damage Stages Of This Case. Accordingly, Failure To Consummate The Settlement Agreement Raises A Real Possibility That Plaintiffs Will Recover Nothing, A Result Which Would Serve The Interests Of Neither Public Nor Private Class Members

1. Plaintiffs Face The Possibility Of A Failure Of Proof As To Their Horizontal Conspiracy Claims

Plaintiffs have alleged the existence of a horizontal conspiracy, whereas defendants have steadfastly denied the existence of any such conspiracy. Despite the vastness and complexity of this multidistrict proceeding, the core issue of this litigation is the existence or non-existence of such a horizontal conspiracy.*

Unlike the usual case where private suits are filed after related government cases, plaintiffs gain nothing from the earlier suits. Accordingly, it is well to bear in mind the observation of this Court in *City of Detroit* v. *Grinnell Corp., supra*:

> [T]he only truly objective measurement of the strength of plaintiffs' case is found by asking: "Was defendants' liability *prima facie* established by the government's successful action?" Whenever such liability has been *prima facie* established, any party wishing to justify a settlement offer that amounted to only a small fraction

*The vast majority of materials identified to the litigation involves alleged vertical restrictions.

> of the ultimate possible recovery would appear to have a very substantial burden of proof. The instant case, however, does not fall into this category. (495 F. 2d at 455)

Similarly, this litigation does not fall into that category either. Plaintiffs gain nothing from the earlier government suits as to the existence of a horizontal conspiracy for the basic reason that the government, after a lengthy investigation, *did not even allege* the existence of a horizontal conspiracy. The four separate civil suits instituted by the Department of Justice alleged only that certain of defendants' distribution practices, wholly vertical in nature, had been in violation of the antitrust statutes.

We do not propose to review all of the materials—documentary, testimonial and economic—which will bear on this core issue at trial. We do wish to point out, however, in addition to the fact that Emhart has vigorously and consistently denied plaintiffs' horizontal claims, that the remaining defendants are ready to go to trial on this central issue.* Because all defendants would be subject to joint and several liability if the plaintiffs were to sustain their horizontal claims, the risk of liability would be the same for all defendants. Eaton and Sargent, as fully informed as Emhart and plaintiffs after several years of extensive discovery, have determined that it is in their best interests to go to trial on this central question rather than to accept settlement on the same terms as the Emhart settlement.** There could be

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*Defendants Eaton and Ilco have previously proposed separation and trial first of issues related to the alleged horizontal conspiracy among defendants. (AI 188-195)

**Eaton and Sargent, at the Emhart settlement conference with Judge Blumenfeld on June 26, 1975, were offered settlement on the same terms as Emhart. That offer was rejected by Eaton and Sargent.

no more eloquent testimony to the fact that plaintiffs face the possibility of a failure of proof as to the horizontal conspiracy claim. And as will be shown hereafter, if plaintiffs fail on that issue, they fail completely and will recover nothing.*

2. Plaintiffs Face Problems As To Proof Of Damages

In any antitrust damage action, the plaintiffs must, of course, show (a) that defendants have violated the antitrust laws, (b) that those violations have had an adverse impact upon them (the fact of damage) and (c) the amount of the resulting damages. *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368, 392 (9th Cir.), *cert. denied,* 355 U. S. 835 (1957).

Plaintiffs' entire claim to damages rests on their ability to prove the existence of a horizontal conspiracy among defendants. Mr. Freeman, co-liaison counsel for plaintiffs, made this clear in his responses to two inquiries by Judge Blumenfeld concerning plaintiffs' theory of liability:

> THE COURT: Well, whether conceded or not, you don't make a claim based on a separate ground of violation by reason of a vertical conspiracy?
>
> MR. FREEMAN: No.
>
> * * *
>
> THE COURT:
>
> . . . As I understand it, the showing of a series of vertical conspiracies here is in support of the claim that there was a horizontal price-fixing conspiracy and the

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*"Here, plaintiffs have settled in order to avoid the considerable risk that they would not be able to recover at all." *City of Detroit* v. *Grinnell Corp.,* 495 F. 2d 448, 459 (2d Cir. 1974).

> vertical conspiracy merely was a way of implementing and strengthening the horizontal conspiracy.
>
> Am I correct?
>
> MR. FREEMAN: Yes, your Honor. (AI 206-207)

The District Court emphasized the same point in stating:

> The damage claims arise from the horizontal, not the vertical, conduct. Thus the plaintiffs plan to prove illegal vertical restrictions upon the dealers only to demonstrate by implication the existence of a horizontal conspiracy among the defendants to reduce competition (and thus maintain prices above the competitive level) at the dealer level. (AI 325)

Therefore, if plaintiffs fail to establish their horizontal conspiracy claim, they will be left with no recovery whatever.

Assuming *arguendo* that plaintiffs prevail on the question of the existence of a horizontal conspiracy, they still face substantial problems as to proof of damages. For example, there are serious questions regarding the ability of plaintiffs to prove any substantial overcharges related to their horizontal price fixing claim, when viewed at least in light of Emhart's profits, its fixed costs, rates of return in other industries, Bureau of Labor Standards indices, the performance of the distributor market and, most importantly, the fact that other competing non-defendant manufacturers of contract hardware sold similar hardware at similar prices.* Also, there were no "white sales" or substantially reduced prices following the institution of either the government or private suits, as is often the case in price

*One of these, the Schlage Lock Co. of San Francisco, had sales of contract hardware roughly approximating in volume those of Emhart during the relevant period.

fixing conspiracies. In such cases the measure of damages may be computed by comparing the prices before the "white sales" and the lower "white sale" prices. *See, e.g., Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914 (S. D. N. Y. 1965). The burden of establishing a "but for" price—the alleged price at which hardware would have been sold in the absence of or "but for" the conspiracy—is thus a substantial one.

Despite all of these uncertainties and obstacles to recovery and the overwhelming support of the settlement and allocation by class members, Exxon seeks to overturn the allocation provision, thereby jeopardizing the entire settlement agreement and exposing all class members to these risks.

B. Failure To Affirm Will Frustrate Emhart's Expectations

While not of controlling significance, Emhart's desire to end burdensome and expensive litigation and to concentrate its energies and resources in the production of useful goods is entitled to some weight. This is especially so here, where no one objects to the amount of the settlement, and only one class member out of 40,000 objects to the allocation.

V. FAILURE TO AFFIRM THE SETTLEMENT WILL DISCOURAGE PLAINTIFFS AND DEFENDANTS IN OTHER LITIGATION FROM ATTEMPTING TO REACH A SETTLEMENT, A RESULT INIMICAL TO THE SOUND JUDICIAL POLICY IN FAVOR OF SETTLEMENT

A. Settlement Is A Course Favored By The Law

The 80%-20% allocation is an integral part of the settlement agreement. As discussed *supra,* it was on this basis that the class members calculated their expected re-

covery and decided to support the settlement agreement. It is, therefore, clear that failure to approve the allocation may result in the collapse of the entire settlement.

Such a result would not be in keeping with the general policy of the law which favors settlements. This Circuit has acknowledged the substantial benefits afforded the judicial system by ". . . the highly favored practice of settlement," *City of Detroit* v. *Grinnell Corp., supra,* at 459, ". . . a course long favored by the law." *Weight Watchers of Philadelphia* v. *Weight Watchers International, supra,* at 773. The policy is a sound one, serving the best interests of both the parties before the court and the court itself. As this Court is well aware, massive class actions such as the one before the Court now take years to prepare for trial, and few cases of this magnitude proceed to final judgment on the individual class claims. *City of Detroit* v. *Grinnell Corp., supra,* at 467-468; Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 8 (1971). Settlement is the more usual course. In large part this reflects the desire of plaintiffs to compromise their claims in return for an award now rather than at some uncertain time in the distant future, the corresponding desire of defendants to avoid the continuing costs and inconvenience of protracted, complex litigation, and the recognition by all parties of the risks of litigation. But it also reflects a recognition of the limitations inherent in the judicial process. Massive class actions present great problems of manageability, for ". . . courthouses are not coliseums . . .", *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F. 2d 295, 298 (2d Cir. 1969), and while there are certain advantages involved in trying related grievances in a single proceeding, there are disadvantages as well. One such disadvan-

tage is the drain such cases place upon necessarily limited judicial resources. *See* Burger, *Chief Justice Burger Issues Year End Report,* 62 A. B. A. J. 189 (1976); Burger, *The State of the Judiciary—1976,* 62 A. B. A. J. 443, 444 (1976); H. FRIENDLY, FEDERAL JURISIDICTION: A GENERAL VIEW (1973). In evaluating a proposed class action settlement in a case of this type, this Circuit in *City of Detroit* v. *Grinnell Corp., supra,* considered such factors relevant. This Court observed that:

> [U]ntil the day of unlimited judicial resources dawns, the fact will remain that each hour of judicial effort that is expended on the claim of one plaintiff will mean that fewer hours will be available for all others. Thus, the consideration of "judicial burden" does not really amount to a weighing of the interests of the courts against those of the plaintiffs, but rather it is a weighing of the *bona fide* interests of these plaintiffs against the interests of all others who are pursuing just causes of action. (495 F. 2d at 467)

Even a limited settlement is desirable when complex, multiparty litigation is involved, for experience shows that disposition of an entire case by settlement often begins with settlement by one party. Moreover, even if such total disposition is not achieved, settlement by one party assures plaintiffs of a substantial recovery even if the non-settling defendants should eventually prevail at trial and at the same time allows the settling defendant to withdraw from litigation it no longer wishes to pursue.

B. Reversal Will Discourage Future Settlements

As has been shown above, it is difficult to conceive a clearer case for approval of a settlement: no objection to the settlement amount, determination of the allocation

based on contemporaneous sales data rather than bargaining among counsel, and approval by all counsel, all but one of 40,000 class members, and an experienced and involved District Judge. Upsetting this settlement not only would undo the results of a tremendous amount of work, but would discourage antitrust defendants generally from making settlement offers, particularly in situations where, as here, the question of violation is far from clear.

VI. JUDGE BLUMENFELD DID NOT ABUSE HIS DISCRETION IN APPROVING THE EMHART SETTLEMENT

The foregoing discussion has pointed out the extensive nature of the evidence, both legal and statistical, before Judge Blumenfeld when he found the settlement agreement, including the allocation provision contained therein, fair and reasonable.* As has been shown, that evidence more than supports a finding that the settlement is a just one and well within the discretion of the trial court to approve. Indeed, the present case is a singularly inappropriate one for Exxon to seek a determination that the District Court abused its discretion, for there was here unique, contemporaneous sales data from which could be made an allocation of the settlement fund.

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*Judge Blumenfeld has recently shown his willingness to disapprove settlements in complex class action litigation where the standards set by Rule 23(e) have not been met. In his "Ruling On Proposed Stipulation of Settlement" in *Hilde Herbst & Aaron F. Fine* v. *Int'l. Tel. & Tel. Corp., et. al.*, Civil Action No. 15,155 (D. Conn., August 11, 1976) [*see Herbst* v. *Int'l. Tel. & Tel. Corp.*, 495 F. 2d 1308 (2d Cir. 1974)], Judge Blumenfeld properly recognized that his task was to evaluate the "fairness, adequacy and reasonableness of the proposed stipulation of settlement." After reviewing the evidence, he concluded that he could not approve a settlement which would have released all present ITT directors and director-defendants from all claims related to the transactions which formed the basis of the *Herbst* suit. He found that justice required such a result despite the fact that approval would have resulted in a settlement payment of $23 to $35 million dollars and an end to his involvement in complex litigation.

CONCLUSION

For all of the above reasons, Emhart respectfully submits that the decision of the District Court was correct and should be affirmed.

Respectfully submitted,

Defendant-Appellee
Emhart Corporation

By RALPH C. DIXON, ESQ.
DAY, BERRY & HOWARD
One Constitution Plaza
Hartford, Connecticut 06103
(203) 278-1330
Its Attorneys

On the brief:

RICHARD M. REYNOLDS, ESQ.
HOWARD P. JAMES, ESQ.

CERTIFICATE OF SERVICE

I, HOWARD P. JAMES, certify that I have this 24th day of August, 1976, caused to be mailed 2 copies of the Brief of Defendant-Appellee Emhart Corporation on those attorneys appearing on the following list of counsel, pursuant to Rule 25 of the Federal Rules of Appellate Procedure.

John W. Barnett, Esq.
Wiggin & Dana
195 Church Street
New Haven, Connecticut 06508

Walter A. Bates, Esq.
Arter & Hadden
1144 Union Commerce Building
Cleveland, Ohio 44115

Charles Donelan, Esq.
Bowditch & Lane
311 Main Street
Worcester, Massachusetts 01608

Gerald J. Dowling, Esq.
Assistant Attorney General
State of Connecticut
30 Trinity Street
Hartford, Connecticut 06106

Lee A. Freeman, Jr., Esq.
Freeman, Rothe, Freeman & Salzman
One IBM Plaza, Suite 3200
Chicago, Illinois 60611

H. Laddie Montague, Jr., Esq.
David Berger, P.A.
Attorneys at Law
1622 Locust Street
Philadelphia, Pennsylvania 19107

Gerry J. Elman, Esq.
Deputy Attorney General
Capitol Annex
Harrisburg, Pennsylvania 17120

Joseph R. Lally, Esq.
Deputy City Solicitor
City of Philadelphia
15th Fl., Municipal Services Bldg.
Philadelphia, Pennsylvania 19107

Fredric B. Burns, Esq.
Sager & Burns
Suite 300 Bank of Kendall Bldg.
8603 S. Dixie Highway
Miami, Florida 33143

Evan Davis, Esq.
Antitrust Division
Corporation Counsel
Law Department, New York City
Municipal Building
New York, New York 10007

Joseph D. Landi, Esq.
Assistant Attorney General
Anti-Monopolies Bureau
Room 4686, 46th Floor
Two World Trade Center
New York, New York 10047

J. F. Steineger, Jr., Esq.
Special Assistant Atty. General
Steineger and Reid
Two Gateway Center, Suite 201
Kansas City, Kansas 66101

Frederick Steinhardt, Esq.
1503 Ford Building
Detroit, Michigan 48226

Michael B. Lewiston, Esq.
Bodman, Longley, Bogle,
Armstrong & Dahling
1400 Buhl Building
Detroit, Michigan 48226

Ronald I. Wiseman, Esq.
Attorney General's Office
Antitrust Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215

William F. Hyland, Atty. General
Bruce R. Volpe, Dep. Atty. General
State of New Jersey
28 West State Street-Room 1108
Trenton, New Jersey 08608

Richard H. Snyler, Esq.
Antitrust Division
U. S. Department of Justice
Washington, D.C. 20530

John F. Beckman, Jr., Esq.
Special Deputy Atty. Gen'l of
Indiana
Tinkham, Beckman, Kelly &
Singleton
5900 Hohman Avenue
Hammond, Indiana 46320

Chauncey H. Browning, Jr., Esq.
Attorney General
State Capitol
Charleston, West Virginia 25305

Perry Goldberg, Esq.
120 South LaSalle Street
Suite 820
Chicago, Illinois 60603

Harold J. Lessner, Esq.
Assistant Attorney General
The State of Wisconsin
Department of Justice
Madison, Wisconsin 53702

John E. Bailey, Esq.
Kevin F. Cunningham, Esq.
The Law Department
The Gulf Companies
P. O. Box 3725
Houston, Texas 77001

Joseph P. Griffin, Esq.
Arent, Fox, Kintner, Plotkin
& Kahn
1815 H Street, N.W.
Washington, D. C. 20006

Warren Spannaus, Atty. Gen'l.
Thomas R. Much, Special Ass't.
Atty. General
State of Minnesota
Department of Justice
St. Paul, Minnesota 55100

Frank J. Kelley, Attorney General
State of Michigan
525 West Ottawa
Lansing, Michigan 48913

Evelle J. Younger, Atty. General
Warren J. Abbott, Ass't Atty.
General
William S. Abbey
H. Chester Horn, Jr.,
Deputy Attorneys General
3580 Wilshire Blvd.-Room 800
Lost Angeles, California 90010

Ralph C. Dixon, Esq.
Richard M. Reynolds, Esq.
Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103

G. Joseph King, Esq.
Howrey & Simon
1730 Pennsylvaria Avenue, N.W.
Washington, D.C. 20006

Samuel H. Seymour, Esq.
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Joseph D. Tydings, Esq.
Danzansky, Dickey, Tydings,
Quint & Gordon
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Howard P. James
HOWARD P. JAMES

Sworn to before me this

24th day of August 1976.

Robert F. Whalen
Notary Public

ROBERT F. WHALEN
Notary Public, State of New York
No. 31-4236850
Qualified in New York County
Commission Expires March 30, 1977